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IN THE CIRCUIT COURT OF
THE 11TH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, FLORIDA

GENERAL JURISDICTION DIVISION

CASE NO. 94-08273 CA (22)

HOWARD A. ENGLE, M.D.,
et al.,

Plaintiffs,

vs.

R.J. REYNOLDS TOBACCO
COMPANY, et al.,

Defendants.
_____/

Miami-Dade County Courthouse
Miami, Florida,
Wednesday, 8:53 a.m.
March 31, 1999

TRIAL - VOLUME 271

The above-styled cause came on for trial before the Honorable Robert Paul Kaye, Circuit Judge, pursuant to notice.

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APPEARANCES:

STANLEY M. ROSENBLATT, ESQ.
SUSAN ROSENBLATT, ESQ.
On behalf of Plaintiffs

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ROBERT C. HEIM, ESQ.
SEAN P. WAJERT, ESQ.
On behalf of Defendant Philip Morris

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NORMAN A. COLL, ESQ.
On behalf of Defendant Philip Morris

ZACK KOSNITZKY
STEPHEN N. ZACK, ESQ.
On behalf of Defendant Philip Morris

CARLTON FIELDS WARD EMMANUEL SMITH & CUTLER
R. BENJAMINE REID, ESQ.
On behalf of Defendant R.J. Reynolds

JONES, DAY, REAVIS & POGUE
RICHARD M. KIRBY, ESQ.
On behalf of Defendant R.J. Reynolds

KING & SPALDING
MICHAEL RUSS, ESQ.
RICHARD A. SCHNEIDER, ESQ.
On behalf of Defendant Brown & Williamson

CLARKE SILVERGLATE WILLIAMS & MONTGOMERY
KELLY ANNE LUTHER, ESQ.
On behalf of Defendants Liggett Group
and Brooke Group

SHOOK HARDY & BACON
EDWARD A. MOSS, ESQ.
WILLIAM P. GERAGHTY, ESQ.
On behalf of Defendant Brown & Williamson
JAMES T. NEWSOM, ESQ.
On behalf of Defendant Lorillard

DEBEVOISE & PLIMPTON
ANNE COHEN, ESQ.
JOSEPH R. MOODHE, ESQ.
On behalf of Defendant The Council for Tobacco Research

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(APPEARANCES - Continued)

GREENBERG TRAURIG HOFFMAN LIPOFF ROSEN & QUENTEL
DAVID L. ROSS, ESQ.
On behalf of Defendant Lorillard

MARTINEZ & GUTIERREZ
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On behalf of Defendant Dosal Tobacco Corp.
and Tobacco Institute

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AARON MARKS, ESQ.
NANCY STRAUB, ESQ.
On behalf of Defendants Liggett Group
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R. NOEL CLINARD, ESQ.
On behalf of Philip Morris.

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(Whereupon, the following pr dir s were had:)

THE COURT: Who's got th paper?

MR. HEIM: I do.

THE COURT: It's always something. It's always something in the paper.

All right. Have a seat.

What is this story I see in the paper about Philip Morris sending out birthday cards? What do you know about that?

MR. HEIM: What do I know about it?

THE COURT: Yes.

MR. HEIM: I just read it this morning. I mean, I think -- I think what -- you know, my understanding of what the practice is, is that they -- they keep a registry of people who have sent in, saying that they want to receive Philip Morris advertisements and materials; and each of these people that send in their name has to sign an affidavit or something that says: I'm 21 years of age, and I want to get this -- not 18, 21, and I want to get this.

So, I don't know where they get this story from.

THE COURT: What did the story actually say? The person who received the card was -- I didn't actually read the whole thing, Page 23. I got the page

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of 23.

MR. HEIM: I think the thrust of the story was that even though the material may be sent to somebody who's 21 or over --

THE COURT: Somebody else gets it.

MR. HEIM: There are other people in the household. I think that's the thrust of it.

THE COURT: Yes. I guess that's the problem.

MR. HEIM: I guess that's -- in a way, it's like anything else. If it's a billboard, everybody sees it. Well, you send it to somebody who's 25.

THE COURT: Yes.

MR. HEIM: Somebody else in the household.

MR. ROSENBLATT: You know, our position is that it's clearly wrong, when cases are going on, for Philip Morris to be sending birthday cards to people. You know, I don't know what the solution is.

We're not asking for a mistrial, naturally. But it's just a wrong thing for them to do, and there's just no stopping them from it.

THE COURT: It's not endemic to Miami. All nationwide, I guess.

MR. ROSENBLATT: I know. I know.

THE COURT: There are cases all over. Oregon, I guess, they can now send cards in Oregon

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because they have cases over there.

If you see Walt Cofer or anybody gets in touch with him, give him my best.

MR. REID: He will probably read it this morning, Judge.

THE COURT: I was going to send him a copy of that picture, and I was going to -- in the middle of the picture and say: What do you mean, $81 million? However --

MR. HEIM: I think Walt would enjoy that, but probably not today.

THE COURT: No. I think it would really be rubbing it in.

MR. ROSENBLATT: Probably not ever.

THE COURT: Not ever. But I've got to ask the jury to see whether they have seen both of those stories.

MR. ROSENBLATT: There is a matter I would like to take up. I would ask the witness to leave.

THE COURT: All right. Who is the witness?

MR. REID: Step out for a moment.

(The witness exited the courtroom.)

MR. ROSENBLATT: Judge, I'm mentioning this in an abundance of caution. I don't know if Mr. Reid plans on asking the witness his opinion as to whether

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cigarette smoking causes kidney cancer.

Now, kidney cancer you struck, but there's no doubt -- there's very little doubt in my mind, I think this was simply a mistake.

THE COURT: Yes. I got this.

MR. ROSENBLATT: As we reviewed it, Dr. Burns and Dr. Samet clearly said -- okay. The only reason I bring this up is I'm inviting them to ask the witness about kidney cancer, because if Your Honor changes his mind, then, you know, they'd want to bring him back.

THE COURT: Yes.

MR. ROSENBLATT: So I mention it for that reason. Kidney cancer, you know, definitely should -- we feel should not have been stricken. I don't care, but I simply mention it.

MR. REID: I have no -- I don't intend to ask about kidney or prostate cancer.

THE COURT: Well --

MR. REID: So --

THE COURT: Here's my problem.

MR. REID: We're not prepared to do that today.

THE COURT: I just read this thing this morning very briefly that I got yesterday, which was a motion for rehearing and clarification on those disease

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issues. And from my very quick reading of this thing, apparently there is some testimony as it may relate to kidney cancer, and a corollary to this, there are some other cancers or conditions that the Court entered an order striking. And I've got to review that.

MR. REID: Your Honor, we have --

MR. NEWSOM: Your Honor, you may remember that we argued that we never said there wasn't any evidence on some of those diseases. The position was that although --

THE COURT: It was contradictory evidence.

MR. NEWSOM: Although there's some evidence, it's contradictive evidence. That's still our position.

THE COURT: The contradictory evidence, unfortunately, I don't think meets the test for a DV at that stage. That's where the problem comes from.

MR. REID: Well, Your Honor, I had not intended to ask -- I didn't prepare for that. I didn't speak to the doctor about kidney cancer, since the summary -- since before the directed verdict was entered. Given the schedule, that's another reason I have cut it down. We're only going to talk about bladder cancer.

THE COURT: But assuming that I do clarify

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that order and incorporate kidney into the class of acceptable diseases for the purposes of this trial, then what?

MR. REID: Well, we'll have to decide what to do at that time. I mean, I understand exactly what the problem is.

THE COURT: I don't want to cut you off either.

MR. REID: Sure. I'm saying from a practical point of view, I couldn't do it today.

THE COURT: The point is, was this fellow the kind of witness you would have used?

MR. REID: Yes, sir. That was his -- he's a urologist. He's a very narrow witness.

THE COURT: Yes.

MR. REID: He is a treating physician, treater, not a researcher or anything like that; and he is going to talk about bladder cancer, and that's all. So his direct is probably only going to be a half an hour, 45 minutes.

THE COURT: I understand he would have.

MR. REID: He would have, if we prepared him.

THE COURT: He has the knowledge. That's the point.

MR. REID: Yes, sir, he does. And we'll just

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have to deal with it -- if that ruling is what happens, we'll just have to deal with it at the time.

THE COURT: Or I could say, all right, go talk to him now and see what you want to do with it.

MR. REID: Well, he has a flight problem, if you remember. He has surgery this afternoon, so that wouldn't be practical. And we just couldn't get ready to do that quickly.

THE COURT: All right. But I mean, I don't know what I'm going to do. I really don't.

MR. REID: I understand.

THE COURT: But if I do, you should not be precluded from producing evidence to that effect.

MR. REID: Right. And I may have to face that. If you do, then we'll deal with it at the time and decide if it warrants bringing him back.

THE COURT: All right. I'm giving you the opportunity now or then, either way.

MR. REID: Well, at this point I'll say -- I won't take it now, and I'll wait and see about it then --

THE COURT: Okay.

MR. REID: -- based on what you do.

THE COURT: I'm certainly not going to preclude you from that.

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MR. REID: No. I understand. Like I say, with the scheduling problem, I've really tried to cut this to as short a direct as I can.

THE COURT: All right. And one of these days we're going to have to take this thing up. Could take it up this afternoon, or whatever?

Have you prepared a response to this motion?

MR. NEWSOM: We didn't get it until 5:00 yesterday.

THE COURT: Okay. So we're going to need some time.

MR. HEIM: A little bit of time.

THE COURT: All right. Let's bring the jury out.

(The jury entered the courtroom.)

THE COURT: Good morning, folks.

JURY PANEL: Good morning.

THE COURT: How are you today?

JURY PANEL: (Responds affirmatively.)

THE COURT: You all made it in time. That's good.

Again, I have to ask you the usual questions. And because of unusual circumstances, did anybody see in the newspapers or hear on TV or radio or in any way come in contact with any information that may relate to

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tobacco issues, either in Florida or elsewhere, or in any manner, shape or form, whether it's connected with with this case or not?

JUROR #577: (Responds affirmatively.)

THE COURT: People have seen something. Let's find out what it was. I don't want to get into detail.

JUROR #331: (Responds affirmatively.)

JUROR #459: (Responds affirmatively.)

THE COURT: But what publication or medium?

JUROR #331: I heard on the news last night.

THE COURT: On the news? Okay.

Was that about another case?

JUROR #331: Yes.

THE COURT: And how about you, sir?

JUROR #459: This morning, NBC.

THE COURT: About another case?

JUROR #459: About another case.

THE COURT: Okay. Anybody else?

JUROR #729: Same thing.

JUROR #577: Headline in the paper.

JUROR #614: Headlines in the Herald.

THE COURT: There were a couple of stories in the Herald today.

JUROR #614: No. I haven't read them.

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THE COURT: Okay. So the point being, that you can't take something out of your ears that you hear. We understand that. But you can discount it in your mind as it may relate to any decisions that you have to make in this case. So are we all of one mind that you can do that?

JURY PANEL: (Responds affirmatively.)

THE COURT: As far as seeing something in the paper, having read a headline, you know you're not supposed to read the rest of the article, and you're all telling me you follow those instructions?

JURY PANEL: (Responds affirmatively.)

THE COURT: I have no control over the public medium, so they do whatever they want to do, and we're stuck with it. I know that you understand the importance of this trial and are confining it to just this trial and the evidence in this case, and you've been very good so far and hopefully will continue throughout the course of the trial that way.

We don't need any more problems. We have plenty of problems.

JUROR #459: That's right.

THE COURT: So we -- when I say we, I'm talking about everybody involved in this case, both sides, and everybody connected with it, really

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appreciate your cooperation in this trial.

Okay. Ready with a witness?

MR. HEIM: Yes, sir.

MR. REID: Yes, sir. I call Dr. Cockburn.

THE COURT: Doctor.

Thereupon:

ALDEN COCKBURN, M.D.

having been called as a witness, was duly sworn, examined, and testified as follows:

MR. REID: I guess I should remind you, I'm Ben Reid, and I represent Reynolds Tobacco Company.

THE WITNESS: C-O-C-K-B-U-R-N, Cc [illegible]burn.

THE COURT: Yes, sir. You may pr[illegible]d.

MR. REID: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. REID:

Q. Doctor, would you tell the jury your full name and tell them what you do for a living.

A. I'm -- my name is Alden Cockburn. It's spelled C-O-C-K-B-U-R-N. I'm a urologist, and I subspecialize in uro-oncology, which is the practice of treating cancers of the urinary tract.

Q. And where do you live?

A. I live in Tampa, Florida.

Q. And how long have you lived in Tampa?

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A. For the past 14 years.

Q. Now, Doctor, the jury has heard from a number of different medical doctors and Ph.D.'s and so forth.

Do I understand you treat patients?

A. That's correct.

Q. And you treat patients who have urological problems and cancer?

A. And cancer.

Q. Okay. Let's talk a little bit about your background.

Now, the jury has heard talk from time to time about board certification. Can you remind them what it takes to become board certified in your field?

A. Yes. After four years of college, one goes to medical school, then completes a year of internship, in my case, in surgery; and another year of general surgical residency; followed by three years of residency in one's specialty, and in my case, it was urology.

I followed that with a fellowship in kidney transplantation and subsequently went into the field of cancer surgery, which is oncology, for another year.

Q. After you do all of that work and that education, do you have to take an exam?

A. Yes. One takes boards at the end of the

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residency. These are written boards. And then after 18 months to two years, you present the cases that you have accumulated over that period of time, and you present them to what are called your oral boards. And there you have a professor -- you stand in front of a professor, present him your cases, and then he quizzes you on the management of different problems.

Q. And are you board certified?

A. I am.

Q. And when did you obtain your board certification?

A. In 1981.

Q. Now, we're going to talk specifically about bladder cancer, but before we get to that, I'd like to talk with you about the general nature of your practice as a urologist. Can you give the jury an idea of what you do on a day-to-day basis in your work?

A. Usually I have operating cases, in the morning. And then I go to the office, and I see patients, adults and children, ranging from everything from urinary incontinence, where they're losing their urine, to blood in the urine, and treating cancers of the kidney, ureter, bladder, prostate, et cetera, kidney stones, infections. That stuff.

Q. You mentioned transplantation. Do you still

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get involved in the process of kidney transplants?

A. I'm not as involved with kidney transplantation as I was in the past. It's become -- medicine has become very subspecialized, and I will be called in to handle only the urological complications of the kidney transplant. The kidney is transplanted into the groin area, and the ureter is placed into the bladder, and sometimes there are leaks and problems with that, and that's when I'll be called in.

Q. Where did you grow up, by the way, Doctor?

A. I grew up in Brooklyn, New York.

Q. Okay. And you're married?

A. I am.

Q. And you've been living in Tampa since what year?

A. Since 1985.

Q. Okay. Now, what percentage of your practice, Doctor, would you say is involving the actual treatment of cancer?

A. I'd say about 30 percent of my patients have cancer.

Q. And the cancer that you treat, is it focused on bladder or does it -- is it broader than that?

A. All cancers, the most common cancers in the urinary tract is the prostate, so I see more prostate

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patients, but bladder cancers are a fair percentage of my cases.

Q. Can you give the jury an estimate of how many bladder cancer cases you might see in a year?

A. On an average, I'll see between two and four new patients with bladder cancer a month, and in total, over the course of a year, perhaps 50 or 60 cases.

Q. Okay. Now, do you diagnose cancer yourself in your patients, typically, or do you get referrals from other physicians who have diagnosed cancer?

A. Both. I will see patients who were referred to me because they're found to have blood in the urine. Usually it's microscopic. The patient doesn't usually see it him or herself. And then I go through the diagnostic techniques, like looking into the bladder or doing different X-rays that might discover the cancer.

Because of my subspecialization and having done extra training in cancer surgery, other urologists will send me patients that have been diagnosed to have cancer, in whom the treatment is removing the bladder and making a new bladder out of their bowel, and I do that.

So, I will get patients who have already been diagnosed to treat.

Q. Now, once you get the patient, do you

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become -- I guess you could call it the primary care physician for that patient?

A. That's correct.

Q. And then you would follow the patient through all of the cancer treatment that the patient might have?

A. Yes, sir.

Q. And I take it --

A. But I don't do what is called medical oncology. If a patient is found to have cancer that is spread beyond the bladder, then it's no longer surgically removable, then I will have the patient transferred to a medical oncologist or a radiation oncologist, who will then administer drugs or radiation to the patient.

Q. Let's talk a few minutes about your education. Where did you get your undergraduate degree and what did you study?

A. I majored in biology at the City University of New York at City College.

Q. And when did you graduate?

A. In 1970 -- in 1970.

Q. Okay. And where did you go to medical school?

A. I went to Tufts University School of Medicine

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in Boston.

Q. Now, once you finished medical school -- we've heard from other doctors -- there are a series of things you do, residents and interns. Can you tell the jury just quickly describe your -- not too quickly --

A. Quickly, because it goes on.

Q. -- your course?

A. After four years of medical school, I then went to the Tufts New England Medical Center, where I did two years of general surgery. Then I was taken into the residency program at the Lahey Clinic in Boston.

Q. Let me stop you. What's the Lahey Clinic?

A. Lahey Clinic is a free-standing, multispecialty clinic, much like the Mayo Clinic and the Cleveland Clinic. And they were started many years ago in Boston.

And after three years of my urological residency, then I did a fellowship at Lahey Clinic in kidney transplantation and probably did about 25 transplants during that period of time.

Then I was asked to specialize in oncology because I was taken in with a group and they needed an oncologist, so they sent me to New York to do a fellowship at the Memorial Sloan-Kettering Cancer

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Institute in New York to do a year of cancer surgery.

Q. Okay. Now, we've heard Sloan-Kettering before. Remind us what that is.

A. Sloan-Kettering is one of the premier cancer hospitals in the world, much like M.D. Anderson, where they specialize only in cancer. You have to have a cancer in order to be treated at the hospital, so that everything from lymphomas in children to melanomas in adults or all of the specialties are indicated in the cancer of those areas.

Q. When you finished your fellowship at Sloan-Kettering, was that the end of your formal education?

A. My formal education, yes.

Q. And what did you do next?

A. At the time I was interested in academic medicine, and so I took a position at Columbia University as assistant professor, and I was the chief of urology at Harlem Hospital, and I spent a total of five years there in that position.

Q. And what was the focus of your work there?

A. At Harlem Hospital, I was administrative head, responsible for the -- running the department, as well as teaching the medical students, interns and residents who rotated through my program.

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I also had clinical and research responsibilities at Columbia University. Clinical means that I saw patients and treated patients. And my research at the time was in prostate cancer, and I treated rats.

Q. Why did you treat rats?

A. Treat them nicely.

Q. I guess so.

Why did you treat rats?

A. Oh.

Q. I assume that you treated them nicely.

A. Medicine won't go anywhere without research, and there's still a lot of unanswered questions regarding different types of cancers, how they're formed, why they're formed, why they form in certain individuals and not in other individuals. We were working with a model.

We have, fortunately, for prostate cancer a model, and that is, we have an animal that we can duplicate the same tumor that we see in humans. So we take the human tumor, we transplant them into certain rats. These rats are called nude mice. They don't have any hair, and they're specially bred so they will accept certain tumors and not reject them, and we can administer different drugs to the rats and see what the

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effect of the drug on the tumor within the rats is, and then get an idea of what drugs might be useful in using -- in use in humans.

Q. So the research that you were doing focused more on treatment of cancer?

A. That's correct.

Q. If you add up your internship, residency and the work at Columbia, during that whole period, were you seeing patients on a regular basis?

A. Yes, I was.

Q. So, could you estimate how many patients you saw over that period of time, in your career? I mean, would it be hundreds, thousands?

A. Hundreds.

Q. Okay. All right. Now, when you -- I think you left Columbia in 1985. What did you do then?

A. Then I moved to Florida. I left academic medicine and went into clinical practice.

Q. And since '85, have you essentially had the same type practice over there in Tampa?

A. Yes, I have. I still keep my hand in teaching. I like teaching, and so I have what's called a clinical professorship at the University of South Florida.

I still teach medical students and residents,

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as needed.

Q. And you're a member of, I guess, the board that -- what's the board called that certified you?

A. The American Urological Association, and then the board of the American Urological Association.

Q. And are you also a member of the American Cancer Society?

A. I am.

Q. Do you -- as part of your professional work, do you give lectures to groups also?

A. I do.

Q. What -- can you give the jury an idea of the type lectures that you give?

A. Uh-huh. My job as a clinician is also to prevent disease, and the best way of preventing disease is to alert patients, all of us, as to the possible factors that we can do to prevent disease or look for disease, to catch it at an early stage so we can treat it and cure it.

Cancer can be cured if we find it at an early stage. So through the American Cancer Society, they will set up groups that I'll go and speak to. I will go to churches and speak there, or to the Rotary Club, to the lay public, and pass the word.

Q. What word are you passing?

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A. Prevention, mostly, and what -- the seven warning signs of cancer: a wound that's not healing, bleeding from mouth or anus or vagina. These are the things that will lead to the discovery of different types of cancers.

Q. Now, you don't currently do any -- any formal research, as I understand it?

A. No, I don't.

Q. And you told us about the research you did at Sloan-Kettering. Have you published articles from time to time?

A. Yes, I have. When I was in academic practice, I published several papers dealing with prostate cancer, kidney cancer, different modes of therapy.

Q. Were your articles -- any of your articles published in what you've been told are peer-reviewed journals?

A. Yes. They were all peer-reviewed. That is, that you submit an article, and it is read by other doctors in that field, and they give their critique, and then it is then passed or not passed. If it passes, it gets published.

Q. And have you also prepared a chapter in a book?

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A. I've written a chapter on urology in a textbook on nephrology. That is the medical practice -- medical treatment of kidney diseases.

Q. I mentioned earlier -- today you're going to be talking about bladder cancer; is that correct?

A. That's correct.

Q. And do you charge attorneys when you appear as a consultant?

A. I certainly do.

Q. Okay.

A. They charge me.

Q. Do you have a will?

What's the rate?

A. I charge $300 an hour.

Q. And do you -- have you ever testified in a trial relating to tobacco before?

A. No.

Q. Aside from this case, have you ever given a deposition involving any case relating to tobacco smoking?

A. Never.

Q. Have you testified from time to time in any sort of litigation --

A. I have.

Q. -- as an expert?

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And what kind?

A. These are malpractice cases in which I will be a defense witness, usually defending other doctors.

MR. REID: I want to get -- we have a chart over here, if I may, Your Honor, put it down, and I want to talk about it.

BY MR. REID:

Q. Dr. Cockburn, did you ask to have this chart prepared?

THE COURT: Can you just turn it around so I can take a look at it?

MR. REID: Yes, sir.

May the witness step down, Your Honor?

THE COURT: Yes. Sure. There is a pointer over there if you want to use it.

MR. REID: Do you want a pointer?

THE WITNESS: Sure.

THE COURT: I think you best go over on that side.

MR. REID: Let me go over on this side.

THE COURT: You need to push it back a little bit for these folks.

MR. REID: We will. That's a good idea.

BY MR. REID:

Q. Okay. Dr. Cockburn, what I'd like to do --

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they can't see that very well. Let me turn it a little bit more.

Okay. Dr. Cockburn, let's start -- we're going to focus on bladder cancer. Point to the bladder. It's marked.

A. This is the bladder right here.

Q. All right. But can you give the jury an idea of what makes up the urologic system that you generally practice with regard to -- and then after we do the overview, we'll go directly to the bladder issue we're going to be talking about.

A. Okay. You can sum it up by saying the urinary system is the plumbing of the body, basically.

The heart pumps blood to the kidneys, and the kidneys process the blood and makes urine. Urine passes through the ureter down to the bladder. It's held in the bladder until the proper signal is given, and then we expel the urine through the tube called the urethra.

Q. Now, before we talk about bladder cancer, can you tell the jury what cancer is, generally?

A. Okay. Cancer is a general term that speaks to the uncontrolled growth of cells. Okay. All cells have control mechanisms that are built into them that tells them when to grow, when to stop growing and when

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to die. And you can use a cell as a microcosm, a small unit of us in general, our whole bodies.

We have a birth process, a growth process and then we die.

And the same thing happens with all cells. For some reason in some cells, they lack the ability to follow the controls that say you're supposed to -- let's say, stop growing. And they keep duplicating and making more cells. This uncontrolled growth is what we call cancer.

Q. Now, focusing on bladder cancer, is there more than one kind of bladder cancer?

A. There are at least five different kinds of bladder cancer.

Q. Can you tell the jury --

A. Sure.

Q. -- what kinds of bladder cancer?

A. There are very rare cancers of the bladder certain individuals are born with, an inborn abnormality of the bladder that predisposes them to a certain kind of cancer called adenocarcinoma. Adenoid means glandular.

Then the vast majority of cancers are called transitional cell cancers. These are changes that occur in the wall of the bladder, and they're called

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transitional, because you see the bladder is in a unique position between the outside and the inside, and so that the cells of the bladder are in transition between skin cells and glandular cells. So we call them transitional cells, and then they have different gradations within that.

And then there are cancers called squamous cancers. These are like skin type of cancers, and these occur specifically in individuals that have chronic inflammation and infection, like they have stones or a catheter in their bladder. Somebody is a quadriplegic and they can't urinate. We put a catheter in their bladder. If that catheter stays in 10, 15 years, they will develop squamous cell.

Q. Before she tells you, you have to slow down.

A. I have to slow down.

Q. She was going to tell you in a minute, so I beat her to the punch.

A. Then in certain parts of the world, bladder cancer is the most -- one of the most common cancers, like in east Africa and places in the Far East.

And the reason is because of an infection of a certain kind of a worm that's in the water, and the worm gets in through the sole of the foot, gets into the blood system and gets trapped either in the liver

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or some -- in the bladder, and this worm then makes eggs, and the eggs cause a chronic inflammation in the bladder.

And this then leads to the same kind of squamous cell cancer that we see in individuals who have other kinds of irritation, from like catheters and stuff, called bilharziasis, a very common cancer in Egypt, all of the way down to almost South Africa.

Q. All right. Now, Dr. Cockburn, I want to ask you some general questions about bladder cancer. Does the situation ever arise when cancer starts in the bladder, goes to another part of the body?

A. Yes.

Q. And how does that happen, and what's it called?

A. Almost any cancer, once it gets deep -- deeply enough invaded into the tissue in which it resides, can then get access to the blood system or what's called the lymphatic system.

You know what the blood system is. That's the blood pumped by the heart, and then it goes around to the rest of the body. The lymphatic system is the system of not bloods, but let's called it serum, and this is the fluid that travels between the cells. And this fluid then travels up along what are called the

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lymphatic channels, along the great vessels back to the heart, and this provides another avenue of escape for these tumor cells.

Remember, I told you before that these tumor cells are replicating or duplicating themselves very quickly, and in the process, they shed cells. And these cells, it's just like throwing seeds out of a window of a speeding car. Some of them will fall on the pavement and won't grow, but some of them will fall on fertile ground, and they will then grow. This is called metastasis.

So we have metastatic lesions that will develop in the fertile ground. In the body the fertile ground is the liver, lungs, brain and the bones of the vertebral column. Any area that gets a lot of blood is susceptible to metastatic disease.

Q. Does it ever happen in reverse, that a cancer in another part of the body would metastasize to the bladder?

A. Rarely. We do see on very rare occasion, and particularly in one kind of cancer, we don't know why, and that's breast cancer. Occasionally we see it metastasize to the bladder.

Q. Now, can you give us an idea of what treatment you normally would undertake for bladder

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cancer?

A. Treatment is correlated with the degree of involvement of the gland or the organ, in this case, the bladder. If the tumor is superficial, and that is, that it hasn't invaded the superficial lining of the bladder, then it's easily treated with a simple removal.

We look into the bladder with a telescope, and we'll -- we'll have a little wire loop on a trigger mechanism, and we'll engage the tumor, turn on the electrical current, and we'll cut the tumor out and cauterize the tumor and the base, and that essentially cures that tumor.

When I say superficial, an example is if you eat hot pizza and you burn the roof of your mouth, that's a superficial lining of your oral cavity or your mouth. There is a lining on just about every organ of your body that's just as thin. So if you can imagine the thinness of that tissue that's just been removed by that hot pizza, that's superficial. So if the tumor gets below that level, that's where the blood vessels are and that's where the lymphatics are. So if we get it before that stage, we can cure the patient with relatively minor techniques.

If the tumor then invades through that layer

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and into the wall of the bladder, then we have a deeply invasive tumor which has the potential now of metastasizing to other parts of the body, and then we have to remove the organ itself. And in that case, we come in and we remove the whole bladder and then we have to make him a new bladder.

Q. Is bladder cancer a rare cancer in the United States?

A. It's not rare. It's fairly common. Probably one-sixth -- sixth in the number of different types of cancers that affect Americans. I'd say approximately anywhere between 40 to 50,000 new cases a year, in this country.

Q. And do cases of bladder cancer tend to happen at certain times in people's lives?

A. Yes. Bladder cancers tend to occur more in the fifth decade of life. Between the age of 50 and 60 is when we see them most.

Q. Okay. Why don't you take your seat back and we'll move on.

Now, Doctor, I want to talk a little bit now about why people get bladder cancer.

Q. Has anyone ever been able to come up with an animal model to cause bladder cancer in animals from inhaling tobacco smoke?

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A. No. Not at all.

Q. Okay. Now, you mentioned that there was one kind of cancer that you understand the mechanism of, through the foot, the worm and so forth. Does science, in your field, urology, oncology, know why people who smoke get bladder cancer?

A. No, we don't.

Q. Did you understand the -- we've heard -- the jury has heard the word "mechanism." Do you know the mechanism?

A. We don't know the mechanism at all.

Q. Now, are there theories that people in science, in oncology, are working on to try to solve this mystery?

A. We have a working theory right now, and this applies to most cancers, and that is, that there has to be, we think, some initial injury to the gene complex, the gene mechanism of the cells at some time in the distant past, most often when we're in the uterus, as fetuses. At that time, our bodies are developing, and we are susceptible to certain influences at that time, and those influences could be from our mothers, something that they ingested, or exposure that they had in the environment, or it could happen as a result of what's called genetic replication; and that is where

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our cells, you start out with one cell, it divides and becomes two cells, and those divide and get four cells and 16 cells, 64 cells, et cetera. That's how we develop.

Well, in that process of replication, the DNA that we have in each cell has to split down the middle into two, and then it separates into four. While in the process of that separation, sometimes we have what are called cross-linkages, and certain of those chromosomes don't link up like just exactly the way they should, and sometimes we have a little cross, and we -- sometimes a part gets deleted, sometimes a part gets added on, and that's called a genetic defect. That itself may be enough to cause the cancer.

But many people apparently have these genetic defects and don't develop the cancer. So we feel there must be something else that happens later on in life that then triggers something that then leads to the ultimate development of cancer. We call this the two-hit theory. One hit happens early on in life; the other hit occurs later on, due to unknown influences.

Q. Well, in your area of expertise, assuming there's a second hit, would you say that's -- that hit is the cause of the cancer?

A. No. No.

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Q. Why not?

A. Well, because we think that, why is it then, if everyone, say, lived in New York City and everyone is exposed to, let's say, pollution, how come everyone didn't get a certain kind of cancer? Well, it may be that certain individuals were more susceptible to that cancer. Then it must be something that happened to those individuals, something sometime early on that led them to be more susceptible to that second hit.

Q. Is there -- is the term -- does the term "risk factor" have meaning to you in your profession?

A. Risk factor clearly does.

Q. What does it mean?

A. Well, we clearly have identified things that are risk factors, that contribute either by themselves or in -- or synergistically, that is, in addition to something else, to ultimately lead to the development of, let's say, cancer.

So, there are many risk factors, including where you live, where you work, what type of work you do, what kind of materials you handle, exposure to pollution, exposure to cigarette smoking, exposure to certain chemicals, that predisposes you to develop the cancer. Predisposes. It doesn't cause; it makes you more susceptible to the development.

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Q. You mentioned smoking. And let me ask you, is smoking associated with bladder cancer?

A. Yes. Smoking is definitely related as a risk factor to bladder cancer.

Q. So if we were going to make a list, we could put smoking on the list?

A. That's correct.

Q. All right. Now, you mentioned some -- are there other chemicals that have been identified -- well, let me ask you another question first.

These risk factors are identified through epidemiological research?

A. That's correct.

Q. So, there's an association, a statistical association, between smoking and bladder cancer?

A. That's correct.

Q. Now, are there other specific -- you mentioned some broad categories. Are there some other specific substances that have been associated with bladder cancer?

A. Oh, certainly.

Q. Can you name -- can you not -- because I'm going to write it, and I write slower than she does.

What's another one?

A. Okay. Dyes. D-Y-E-S. Analine dyes. In

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fact, bladder cancer was the first cancer to have been found to be associated with an industrial product and it was back in Germany in the 1850s, where they found that individuals who worked in the analine dye factories had a higher incidence of bladder cancer.

So dyes are one.

Q. Okay.

A. Petroleum products. People who work in refineries, people who handle petroleum products, even hairdressers, people who are --

Q. Why hairdressers?

A. Maybe because their hands are so much in the different petroleum products and they used it before the time that they had gloves. And so it becomes absorbed through the skin, very much the same way with people -- mechanics have a higher incidence. Truck drivers, because of exposure to exhaust, the burning of these petroleum distillates.

Q. Exhaust?

A. Exhaust.

Q. That would be part of petroleum, I guess.

Okay. What are some others, other chemicals?

A. We know that chlorine, that we use to disinfect our water, is a risk factor for developing bladder cancer. And these are established through what

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was mentioned as epidemiological studies. That is, when you look at broad populations and then you say: There's a preponderance of a certain cancer in this population, it becomes a risk factor.

Q. How about family history?

A. Yes. Family history has something to do with it, because, again, genetics is a problem. It may be something that you either inherited or something that happened to you in the uterus.

Q. And you mentioned pollution. What about where you live?

A. Clearly, individuals who live in highly industrialized cities, where there is a lot of pollution, have a higher incidence of bladder cancer.

Q. Anything else that comes to your mind? I mean, there may be some others, but any that you haven't mentioned?

A. There's a host of others with varying degrees of risk associated with them.

Q. Have people in your field identified all of the risk factors potentially for bladder cancer?

A. Not at all.

Q. So that means there could be some risk factors that we don't know about?

A. Still unknown, yes.

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Q. Now, I want to ask you about your practice. You said that you see a certain number of patients with bladder cancer on a yearly basis, and I understand you've also seen cancer -- bladder cancer patients throughout your entire career --

A. That's correct.

Q. -- and residency?

Have you had patients who have had bladder cancer and who have a history of smoking, either past or present?

A. Yes.

Q. Have you had patients with bladder cancer that have no history of ever having smoked?

A. Yes.

Q. Same kind of cancer?

A. Yes.

Q. Do you have -- I don't want to go through all these, but have you had patients who have had exposure to various of these risk factors, who have bladder cancer?

A. Yes.

Q. Do you have patients who aren't exposed to any of these risk factors who have bladder cancer?

A. Still get bladder cancer, yes.

Q. And of course, you know people who -- these

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wouldn't be patients -- people who are exposed to these risk factors who never get bladder cancer?

A. That's true.

Q. And that's based on your sitting down and talking to patients over the past 20 some years?

A. Correct.

Q. 20 years. Yes. Almost 30.

A. Yes.

Q. What does that tell you about the causation of cancer?

A. Well, it tells us that we have a lot of -- a lot of research, a lot of money and a lot of time yet to spend in the discovery of what particularly causes cancer, in general, and cause in particular, when it comes to bladder cancer.

We just don't know.

Q. If somebody comes to you and says -- and you diagnose bladder cancer and they smoke, would you reach the conclusion that smoking was the cause of their bladder cancer?

A. No.

Q. Why not?

A. I'd want to know other things: Did your parents ever have bladder cancer? What kind of exposures have you had through your life that may have

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predisposed you? All these different elements that we talked about, and many more, could be working singly or in conjunction to have developed that cancer.

Q. Now --

A. Smoking is only one of them.

Q. I want to go back to -- you mentioned earlier -- you mentioned animal model, and you mentioned mechanism, and I assume within mechanism, you would include genetics?

A. That's correct.

Q. And you said that we know about the risk factors from epidemiology for bladder cancer, but we don't have these two pieces of the puzzle?

A. That's correct.

Q. In your opinion, is it adequate to say: Since we know this piece, we should stop research, since we know associations?

A. No.

Q. Why not?

A. Well, we -- all we know here is that there are different factors that are identified as risk factors. None of them is causative. In particular, to say that this is a one-to-one relationship, that if you have this, you're going to develop this, this has not been shown at all for the reason you asked me before:

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Why is it certain individuals who have cancer never had any of these exposures that we could identify? So we don't have the answer at all.

Q. And what would happen to your practice if you continued and these were answered? What would that lead to, in your practice?

A. Well, I'd be looked at as a whole lot better doctor than I am now because I'd be curing a whole lot more people than I am.

Q. So cure is one of the reasons you might want to go beyond risk factors?

A. Absolutely.

Q. How about prevention?

A. That's just it. We would be able to say: If you stopped drinking chlorinated water, if you absolutely -- if you stopped maybe driving a car or being exposed to pollution or stop smoking, that that by itself would stop the cancer, then it would be a lot easier. It's not that easy.

Q. You can't do that now?

A. No. Not at all.

MR. REID: That's all I have. Thank you, Doctor.

THE COURT: Cross examination.

MR. ROSENBLATT: You surprised me. I didn't

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think you would be that fast. That's a first.

Good morning, ladies and gentlemen.

JURY PANEL: Good morning.

MR. ROSENBLATT: And good morning, Dr. Cockburn.

THE WITNESS: Good morning, sir.

CROSS EXAMINATION

BY MR. ROSENBLATT:

Q. I'm a Brooklyn boy, too. So we have something in common. But I was a little puzzled, because in looking at your curriculum vitae, you were apparently born in Panama?

A. Yes, I was.

Q. Are you Panamanian?

A. No. I'm a naturalized American citizen.

Q. So you came to --

A. I came to the U.S. when I was ten.

Q. When you were a child. And you went to New York?

A. Yes, sir. Brooklyn.

Q. Pardon?

A. Brooklyn.

Q. Brooklyn. One of the five burroughs, but the most important.

A. Indeed.

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Q. Although some people from Manhattan might argue with that.

THE COURT: Don't forget the Bronx.

MR. ROSENBLATT: Or Queens or Staten Island. Okay.

BY MR. ROSENBLATT:

Q. Now, I'll stop being nice.

Dr. Cockburn, you have never done any research on any issue relating to tobacco and health; correct?

A. That's correct, sir.

Q. You have never published anything --

A. No, I haven't.

Q. -- on tobacco and health.

So, let me ask you this question. When you were contacted out of the blue to testify or to review a matter relating to tobacco and health issues, of which you've had no -- zero previous experience, did you say to the lawyer: You know, how come you're picking me, as opposed to other urologists who have been deeply involved in smoking and health issues?

A. I was contacted by another clinician, actually, who asked me if I would be willing to review some -- the clinical data on bladder -- on urinary cancer and its relation to tobacco smoking, and I said

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yes, because it was an intellectual exercise, and -- yes.

Q. Who was that? Who was the clinician?

A. Dr. Lawrence Kahana.

Q. Located in Tampa?

A. Yes, sir.

Q. Did he tell you he was doing this at the behest of an attorney? Or was it your impression that this was strictly a request being made by a medical colleague and that your review had zero to do with litigation, or did you know that what you were being asked to do had a, you know, litigation dimension?

A. I realized that at some point litigation would be involved.

Q. Okay. Well, who was the first lawyer who contacted you about being involved in this case?

A. Miss Henninger.

Q. From what firm?

A. I don't know.

Q. To this day you don't know?

A. I'm sorry.

Q. That's all right.

A. They all have long names, and --

Q. Shook, Hardy and Bacon?

A. I honestly can't tell you.

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Q. Okay. Okay. Was it a Tampa law firm or an out-of-town law firm?

A. I think out of town.

Q. Okay. Now, you mentioned Sloan-Kettering as one of the foremost cancer institutions in America and, therefore, in the world, presumably.

A. That's correct.

Q. And you mentioned M.D. Anderson in the same breath?

A. Yes, sir.

Q. Okay. When you were -- how long were you at Sloan-Kettering?

A. One year.

Q. One year.

Did you come in contact with a Dr. William Cahan, C-A-H-A-N?

A. I know I've seen him, and I know of him, yes.

Q. And you know that he spent about a half century at Sloan-Kettering?

A. Yes, sir.

Q. Now, you're a member of the American Cancer Society?

A. Yes, sir.

Q. You know that the official position of the American Cancer Society is different than the position

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that you have expressed today on the issue of whether cigarette smoking causes bladder cancer; correct?

A. I don't think so.

Q. You think -- you think it's the position of the American Cancer Society that it hasn't been established that cigarette smoking causes bladder cancer?

A. As a matter of fact, I looked up the Web page from the American Cancer Society two days ago, and in it they mention that cigarette smoking is a risk factor in the development of bladder cancer. They mention that there are genetic defects that are probably operant in the ultimate development of bladder cancer, but in nowhere did they say that -- that smoking causes bladder cancer.

Q. And that's the reference source you looked to to find out two days ago, knowing that it would come up, or figuring that it might come up in your examination today.

So in terms of all of the position papers the American Cancer Society has put out over the years, your way of checking it was to go to the Web page two days ago?

A. You asked me specifically if that -- if my position was congruent with that of the American Cancer

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Society --

Q. I know what I asked you.

A. -- regarding the development of bladder cancer relating to smoking, and I said, it is entirely congruent. I agree with what they say, that it is a risk factor.

Q. And my question to you is: Your entire basis for saying that is having gone to the Web page two days ago?

A. No. I've been reading the data on epidemiological studies on bladder cancer, as I described before, spent many years studying bladder cancer, and it is on the basis of all of those years of research and reading that I base my opinion.

Q. Okay. You would consider Johns Hopkins to be one of the finest medical schools in America; wouldn't you?

A. Yes, sir.

Q. And you would consider that -- have you ever heard of Jonathan Samet, S-A-M-E-T?

A. No, sir.

Q. Jonathan Samet is an M.D. --

MR. REID: Your Honor, I object. It's improper to ask one expert --

THE COURT: I'm not sure where we're going

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with this.

MR. ROSENBLATT: I'm --

THE COURT: Do you want to talk about it at sidebar?

MR. ROSENBLATT: No. I don't think it's necessary -- well, okay.

THE COURT: You don't have to.

(The following p[illegible] dir[illegible]s were had at sidebar:)

THE COURT: The objection apparently is pitting one expert against another.

MR. ROSENBLATT: Well, there is --

THE COURT: How do you intend to follow up?

MR. ROSENBLATT: I intend to follow up as follows. There's a chart in evidence that was introduced through the testimony of Dr. Samet where he gave a whole host of diseases, including bladder cancer, that was caused -- and I want to know if he's familiar with Samet's writings on the subject. That's all I'm going to ask him.

MR. REID: He said he wasn't familiar with Samet.

MR. ROSENBLATT: And ask him whether he agrees or disagrees.

MR. REID: He says he wasn't familiar with

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Samet. That's the only reason he would be.

MR. MOSS: We're also getting into another problem that's improper, and that's attempting to bolster one witness --

MR. REID: Dr. Samet.

THE COURT: Well --

MR. REID: The plaintiffs' position is that there's cause.

MR. ROSENBLATT: Basically --

MR. REID: And they've offered that evidence to the jury.

MR. ROSENBLATT: Basically he is --

MR. REID: Our position is it is a risk factor.

MR. ROSENBLATT: The direct examination --

THE COURT: Wait.

MR. REID: The plaintiffs' position is one thing. They've offered lots of evidence about that, and we had questions about the sufficiency, and we have another position and we've offered our position. The jury has to pick the one they think is supported by the evidence.

THE COURT: Obviously he doesn't agree with the causation issue.

MR. ROSENBLATT: Right.

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THE COURT: So it doesn't make any difference if you had 400 people lined up.

MR. ROSENBLATT: But I'd like to know what his -- what his response would be, and undoubtedly he's going to say: Well, Samet probably bases it on epidemiological evidence.

THE COURT: Even that would be a problem. If what you want to do is make a list and say: Okay, here is the list, and do you believe any of these factors are involved in --

MR. ROSENBLATT: This is --

THE COURT: I don't know what list is you're talking about, but if you pull the list out and show the list --

MR. ROSENBLATT: There is a chart.

THE COURT: Right -- the chart, and say: Do you agree with these causative factors? They say: Yea. Anyway, whatever they may say, that's fine. Without mentioning Samet, that's fine.

MR. ROSENBLATT: Well --

THE COURT: But to say this is Samet's list, you know, is a real problem. So that's where we're at. So I'll sustain the objection.

MR. ROSENBLATT: So I can -- I have to look at the chart to see if Samet's name -- as I understand

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your ruling, if Samet's name doesn't appear on the chart, I can show him the chart and say: Would you obviously disagree --

MR. REID: I need to see --

MR. MOSS: We need to see the chart before.

MR. REID: Other than bladder cancer --

THE COURT: Where is the chart?

Let's see.

MR. REID: I'd object to everything he said about it. I mean, this has nothing to do with this witness.

MR. ROSENBLATT: It's in already.

MR. REID: Not with this witness.

MR. ROSENBLATT: I'm not going to ask him about the other stuff.

THE COURT: What are you going to say?

MR. ROSENBLATT: You don't agree with this. You don't a -- you obviously -- obviously this chart says -- you don't agree with that.

MR. MOSS: Judge, this chart doesn't demonstrate anything. He's already asked him: You don't agree with the -- this and that, it causes bladder cancer.

THE COURT: This has too much other stuff in it. All right. That's -- if you're going to use that,

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no, I would disallow using that.

Just simply ask him if he agrees or disagrees that bladder cancer is caused by smoking. He'll say yea or nay, and then at the end of the case, you can show the differences.

MR. ROSENBLATT: Okay. I will -- I will want to break at some point -- and I'm not going to have any problem getting him out of here. So in terms -- I can't imagine that I -- so whenever might be appropriate.

THE COURT: For what?

MR. ROSENBLATT: To take a break.

THE COURT: You want a break now?

MR. ROSENBLATT: Yes. There will just be one break. Whenever -- we could take it in 15 minutes, but now --

THE COURT: 15 minutes?

MR. ROSENBLATT: I'd like a break.

THE COURT: We'll take a break.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: All right. We're going to have to take a short break, folks, at this point.

(The jury exited the courtroom.)

THE COURT: You're still on the witness

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stand. You cannot discuss this case with anyone, including the attorneys. You can discuss anything else.

(A brief recess was taken.)

THE COURT: Okay. I guess we can resume. Bring in the jury, please.

(The jury entered the courtroom.)

THE COURT: Okay. Let's be seated, and we can begin.

BY MR. ROSENBLATT:

Q. Doctor, when you were -- when you were speaking about your membership in the American Cancer Society, and you were talking about this concept of prevention, you would go out, give speeches to the Rotary and so forth, on the best way to prevent disease. When you make these speeches, do you also make them to children? Do you ever have occasion to go to schools and talk to kids about the best way to prevent disease?

A. No.

Q. When you speak to these groups, do you tell them -- what do you tell them on the subject of smoking?

A. I mention smoking among all of the other risk factors. I put things into context.

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I tell people: Look, twice as many people die of heart disease than all of the cancers put together, and you have more control over that than you do the development of cancer, some of which you have no control over because it -- it's already in your gene code and you may or may not develop it.

I might tell them to exercise, cut down on the fats in their diet. I warn about smoking. I warn about different factors in their lifestyle that would predispose them to various diseases.

Q. If you have a patient -- and obviously from what you said on direct examination, you've had many over the years, you've had patients who had bladder cancer who were smokers. Those particular patients, do you universally tell them to quit smoking?

A. Only if they're going to undergo major surgery. At that point in their lives, they're -- I tell them that they're -- it's their risk, it's something that I wouldn't recommend, but I don't -- I don't preach about it.

Q. I'm not asking you about preaching, Doctor, and obviously, ultimately it's the patient's decision. A doctor can nag. A doctor can preach. A doctor can recommend. But obviously you cannot force a smoker to stop smoking.

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I am simply asking you, when you have a patient who falls in that category, they are a smoker and they have bladder cancer, do you universally recommend -- it's my recommendation, you stop smoking?

A. Yes.

Q. I'm going to discuss very briefly with you some textbooks, and textbooks tend to be thick; don't they?

A. Some of them.

Q. Medical texts?

A. Some of them.

Q. And generally, is it fair to say, that the representative average kind of medical text, that you have editors, and then you have a variety of specialists who contribute a particular chapter to a textbook, as opposed to one or two doctors writing a thousand pages; correct?

A. That's correct.

Q. I think you told us that you had occasion to contribute a chapter in a more general textbook?

A. That's correct.

Q. Okay. This textbook is Cancer Epidemiology and Prevention, Second Edition, edited by David Schottenfeld and Joseph F. Fraumeni, M.D.

And on Page 281 --

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MR. HEIM: Well, Your Honor, could we have some foundation first?

THE COURT: Yes. You're going to have to lay a foundation.

MR. REID: That he knows it and he considers it --

MR. ROSENBLATT: Well, let me --

(The following p[illegible] dir[illegible]s were had at sidebar:)

MR. ROSENBLATT: I thought Your Honor ruled yesterday that it's obviously --

THE COURT: You have to find out what he knows about the text.

MR. ROSENBLATT: It doesn't matter.

THE COURT: Yes, it does to me.

MR. ROSENBLATT: Because then --

THE COURT: He may not be familiar with it.

MR. ROSENBLATT: No. All these -- all these witnesses are sophisticated enough to say: No, I don't consider that authoritative, or to --

THE COURT: I don't know what he's going to say.

MR. ROSENBLATT: Okay.

MR. REID: Could we see?

THE COURT: Let's see what you're going to

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do.

MR. HEIM: And actually, several witnesses yesterday said the contrary.

MR. ROSENBLATT: I did this yesterday. I did this with Hensley.

MR. MOSS: So?

MR. REID: Well, number one, it's --

THE COURT: And, again, it's three against one. You're big enough to handle three against one.

MR. ROSENBLATT: I am. I am.

MR. REID: It's more than bladder to start with, so I object to anything besides bladder cancer. And if he knows this particular chapter, that it's authoritative -- I mean, you have to lay the predicate for this chapter.

MR. ROSENBLATT: You don't have to lay a predicate when a judge can take judicial notice of the fact this is obviously a medical textbook. Look at the list of contributors, Judge, and they're heavyweights from all over the country. And for him to say: No, I don't consider this authoritative, should hardly --

THE COURT: Why don't you ask him first?

MR. ROSENBLATT: I will.

MR. REID: The chapter --

MR. ROSENBLATT: And while we're up here, I'm

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reminded that I asked Dr. Hensley yesterday: How long have you been in Miami?

THE COURT: Yes. I know. I heard that. I thought about that.

MR. ROSENBLATT: He said a week. He said a week. So why wasn't he available Monday?

THE COURT: I don't know. I was going to ask that.

MR. MOSS: Whoa, whoa.

MR. REID: Are you going to use --

THE COURT: Are you going to use that?

MR. ROSENBLATT: No.

MR. MOSS: Your Honor, what the man said was he was here a week, but he was visiting his family in -- let me just finish -- in Miami and Key West.

THE COURT: Yes, right.

MR. HEIM: And I had no knowledge that he was available on Monday, and I don't know what kind of cheap shot that is, but I --

THE COURT: It's not a cheap shot. I thought about it myself.

MR. ROSENBLATT: It's a statement of fact.

THE COURT: He's been here all week.

MR. HEIM: No, it's not.

THE COURT: Hold on.

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MR. MOSS: No. We --

THE COURT: I said to myself, if he's been here all week, prior to that he was probably meeting with the lawyer. It's obvious to me they could have known, should have known he was available here on Monday. I thought whatever witness you were going to present was tied up out of town.

MR. HEIM: Well, the witness we were going to present was tied up out of town. And I had no knowledge that this witness --

THE COURT: I don't know where he was. I'm not making an issue about it. It just occurred to me, why did we waste Monday?

MR. ROSENBLATT: There is, Judge, one other thing, Page 1163.

MR. REID: The same article.

MR. ROSENBLATT: I intend -- yes. Same book.

MR. REID: No. No. Same article.

THE COURT: Different chapter.

MR. REID: Judge --

MR. ROSENBLATT: Can I --

THE COURT: Let me just read this thing. You're going to read this whole thing here?

MR. ROSENBLATT: No.

THE COURT: Just what's underlined.

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MR. ROSENBLATT: Just what's in red.

THE COURT: This whole thing is in red, is what I'm saying.

MR. ROSENBLATT: Yes.

MR. REID: Just the underlined part?

MR. ROSENBLATT: Let me look.

No. Just that first sentence.

THE COURT: Just the first underlining?

MR. ROSENBLATT: Yes.

MR. REID: Do you have a copy of this?

MR. MOSS: No.

MR. REID: Do you have a copy of this we can look at, because --

THE COURT: Let me see how you determine who the chapter --

MR. ROSENBLATT: Were you here yesterday?

MR. REID: Yes.

MR. ROSENBLATT: I brought two of these books.

MR. REID: No. But you could Xerox the pages.

THE COURT: This is the bladder cancer chapter, by these people here, which you may or may not know. And it's Page 1163, under the heading Tobacco. And the other one is what?

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MR. REID: It's Chapter 54, by the way, the Judge just referenced.

THE COURT: Chapter 54. This one is on Page 281. Which chapter then? It's also called Tobacco. Chapter 14, by John Baron and Thomas Rohan.

MR. REID: After you finish using it, will you give me the book then, please?

MR. ROSENBLATT: Yes.

THE COURT: Lend, not give.

MR. ROSENBLATT: Lend, indeed.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

THE COURT: All right. Go ahead.

BY MR. ROSENBLATT:

Q. Dr. Cockburn, are you familiar with this book, in general, this textbook, Cancer Epidemiology and Prevention?

A. No.

Q. There is a chapter in this textbook, the title of which is Tobacco, and the physicians who wrote this chapter are John A. Baron and Thomas E. Rohan. Are you familiar with them?

A. Neither.

Q. There is a Chapter 54 beginning on Page 1156, the title of which is Bladder Cancer. And there are

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three physician authors of this chapter, Debra Silverman, Alan Morrison and Susan Devesa. Have you heard of them?

A. No, I haven't.

Q. You would agree that this is an authoritative textbook?

A. It's a textbook on the subject of epidemiology, yes.

Q. It's a textbook --

A. On the subject of epidemiology.

Q. And prevention?

A. And prevention.

Q. A field you're very interested in?

A. Yes, sir.

Q. Prevention?

A. Yes, sir.

Q. That's what it's all about, really, when you take care of patients, cure and prevention; correct?

A. Correct.

Q. Okay. In the chapter on bladder cancer --

MR. REID: Objection, Your Honor. The foundation wasn't laid for this cross.

THE COURT: Overrule the objection.

BY MR. ROSENBLATT:

Q. In the chapter on bladder cancer, this

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statement appears. It's only, you know, one sentence, and if you want to see it, I'll be happy to show it to you, but let me read it to you first.

The heading is Tobacco, then there's a subheading, Cigarettes.

Cigarette smoking is well established as a cause of bladder cancer, although the association is not as strong as that observed for smoking and several other cancers.

Do you agree or disagree with that statement?

A. May I see it?

Q. This is what I've got underlined, is what I read to you.

A. This may be an authoritative text, but I think there's a miss -- misspeak in here, because it says: Cigarette smoking is well established as a cause of bladder cancer.

I take issue with that because the whole question of cause and risk, it's not been shown that in any way and how -- it has not been demonstrated how cigarette smoking causes, if it does -- causes cancer.

We have only right now acknowledged that it's associated with the development of cancer, but it goes on to say: Although the association is not as strong as that observed for smoking and several other cancers.

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I think they mean something else other than smoking. I think they mean something like, although the association is not as strong as that observed for lung and several other cancers.

Q. So I take it from what you've said, you disagree completely with the part of the sentence which clearly says: Smoking is -- cigarette smoking is well established as a cause of bladder cancer.

That you disagree with?

A. I take issue with that, because it's not been -- it's not been established. They haven't mentioned the mechanism that demonstrates that established cause.

Q. Okay. Now, from the same textbook, Doctor, this is on Page 281 -- and as a matter of fact, the heading of this particular section is, Conclusions: Opportunities for Prevention. And the sentence I'm focusing on is: The evidence is overwhelming that cigarette smoking causes cancers of the oropharynx, larynx, lung and bladder.

And I take it you would also disagree with that statement as it relates to causing bladder cancer?

A. I think you have to go back to the title of the book, and this says, Epidemiology. Okay. What this book does is to compile the evidence that's been

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gathered over the years of studies that have been done in large populations to show that certain -- while populations have an increase in the incidence of certain cancers, and when you look at those populations and you look at their exposures, one of the things that comes out is that there's a higher association with cigarette smoking. But all people who have bladder cancer don't smoke.

So you can't say that smoking causes cancer --

Q. You can say --

A. -- of the bladder.

Q. You can -- you can say, and they clearly say -- this is not me talking. These are your colleagues, urologists, who clearly say -- hear me out -- you're 100 percent correct. No one contends that cigarette smoking causes bladder cancer in 100 percent of people who smoke. That statement obviously is saying, cigarette --

MR. REID: Your Honor, I object as to what counsel believes.

MR. ROSENBLATT: -- cigarette smoking --

MR. REID: I object, Your Honor.

THE COURT: Just a moment.

MR. REID: I object to counsel saying what

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that statement says. That statement --

THE COURT: I'm going to overrule the objection until I hear the question.

BY MR. ROSENBLATT:

Q. That statement clearly says, does it not, that cigarette smoking causes bladder cancer in some people, not all, in some?

A. That's what they say.

Q. Okay. I understand that.

And also, believe me, I've understood what you said on direct examination and your distinction that you've made between risk factor and cause, and obviously you would agree that the authors of the two chapters that I went to in this voluminous textbook, they could have chosen whatever language they wanted to use. They could have said risk factor. They could have said association. But they clearly said cause, and you clearly disagree with that?

A. Because they haven't demonstrated how it causes it.

Q. Okay.

A. An animal model that would demonstrate that.

Again, this is a textbook. These are experts in numbers, in statistics. They're not scientists on the bench or in a lab showing the association, showing

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the demonstrable cause and mechanism.

Q. So, from the standpoint of practical prevention, Doctor, it's now 1999, are you telling us that you can't tell a sick smoker or a well smoker, for that matter, to stop smoking until you have that mechanism firmly established and proven to your satisfaction?

A. No. That's not what I'm saying.

I would say to the sick smoker, the nonsick smoker or a nonsmoker, not to smoke, simply because it's been established that this is a risky behavior.

Q. Look through the acknowledgment page. I mean, look at the contributors --

MR. REID: Your Honor, I object.

MR. ROSENBLATT: -- to this textbook.

MR. REID: That's bolstering, and it's irrelevant.

THE COURT: Yes. Under the circumstances, I'll sustain it.

MR. ROSENBLATT: All right.

THE COURT: That's all right, Doctor. You don't have to go through it.

THE WITNESS: Okay.

MR. ROSENBLATT: Okay.

MR. REID: May I see the book?

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BY MR. ROSENBLATT:

Q. Are you familiar with this textbook, Pathologic Basis of Disease? The authors are -- these are all pathologists -- Dr. Cotran, Dr. Kumar and Dr. Collins. Is this a book you're familiar with?

A. I'm familiar with Dr. Kumar.

Q. Okay. He's a well-respected, authoritative figure in his field?

A. Correct.

Q. Okay.

MR. REID: Your Honor, we need -- I guess we need to come sidebar. I didn't know he was going to use another book.

MR. ROSENBLATT: Well, I'm going to use a few books.

MR. REID: Okay.

THE COURT: All right. Well --

MR. HEIM: Then we need to see all of them.

MR. ROSENBLATT: Fine. Fine. Fine. Let's -- let's -- I thought the doctor was in a hurry. I was trying to speed things along.

MR. REID: He is.

THE COURT: Why don't --

MR. HEIM: Do things right.

MR. ROSENBLATT: Your way?

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THE COURT: Let's take a look. Hold on, gentlemen, please. I don't want to get into this anymore.

MR. ROSENBLATT: Mr. Heim is joining --

(The following proceedings were had at sidebar:)

THE COURT: The usual rule is that they have to acknowledge its authenticity and veracity and knowledge of the book and knowledge of the people who wrote it and all of that. It's also another addendum, too, that is, the Court can, if the Court feels the book is itself authoritative, the Court can accept it as such.

That deals with the source material, which I have done with the other books you've mentioned. Maybe you weren't here yesterday. I don't know.

What are you going to show?

MR. ROSENBLATT: On Page 1007, this yellowed paragraph.

MR. REID: Well, Your Honor, that doesn't impeach anything that he said. It says it's a risk.

THE COURT: Well, so, that's what he says.

MR. ROSENBLATT: Doesn't have to impeach him.

MR. REID: Well, it doesn't have to impeach with him.

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MR. ROSENBLATT: Does he agree with it or disagree?

MR. REID: Unless he disagrees, it's not relevant. You only use it to cross examine him, to impeach.

THE COURT: Not necessarily. Cross examination doesn't necessarily mean you have to have it for impeachment purposes. Maybe he wants to strengthen something he says.

MR. MOSS: But that's what you can't do.

THE COURT: Well, he can do it if he wants to.

MR. REID: So that's the only thing left in this book, so we don't have to come back?

MR. ROSENBLATT: Yes.

THE COURT: Do you have another book?

MR. MOSS: While we're here.

MR. ROSENBLATT: I can bring them all up.

MR. MOSS: Might as well.

THE COURT: Might as well, as long as you're here, see what you're talking about.

MR. ROSENBLATT: Should I, for the record --

THE COURT: I just wanted to see what it is. Okay.

MR. REID: Are you going to use that?

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MR. ROSENBLATT: Steven A. Rosenberg

Page 245, this section here, Judge.

THE COURT: Okay.

MR. REID: I have the same objection, Your Honor. There's no foundation.

THE COURT: All right. Overruled. Okay.

MR. HEIM: While counsel is finding the page on this next book, our position is that, and I think it's right, is that either the witness has to identify the book as being authoritative or Your Honor can, of course, make a ruling that it's authoritative; but there's no basis in the record, other than it's some textbook for making such a ruling.

MR. MOSS: You've got to be provided an evidentiary base, independent.

MR. HEIM: Normally there's an affidavit or something presented that gives the Court a base for drawing that conclusion.

MR. MOSS: That was the basis of my objection yesterday.

THE COURT: Uh-huh.

MR. REID: Let me also add, Your Honor, every one of these books thus far has merely said -- while the word "C-A-U-S-E" is in the paragraph, every one of these is epidemiology. So, it's not the point that

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he's using it -- it's irrelevant, the point he's making. It's completely consistent.

THE COURT: It may strengthen your side of the case. So I think if --

MR. REID: It becomes repetitive at this point, too.

THE COURT: I think these kinds of textbooks --

MR. ROSENBLATT: Cancer of the bladder.

THE COURT: Cancer of the bladder. Okay.

MR. REID: Your Honor, this is also getting repetitive now.

THE COURT: Okay.

MR. ROSENBLATT: Just the one sentence that's underlined in red.

This is not an epidemiology text. This is --

MR. REID: Well, Your Honor, this is the same sentence he read from the other book.

THE COURT: Uh-huh.

MR. ROSENBLATT: Different people.

THE COURT: All right. Go ahead.

MS. ROSENBLATT: And it is epidemiology, Your Honor. In the next paragraph --

THE COURT: Fine. Bring it on.

MR. HEIM: Your Honor, are you finding all of

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these to be authoritative?

THE COURT: Yes.

MR. MOSS: Over our objection, I think.

THE COURT: Yes. Over your objection.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Doctor, I was asking you about this textbook, Pathologic Basis of Disease.

On Page 1007, this statement appears: Cigarette smoking is clearly the most important influence, increasing the risk three-fold to seven-fold, depending upon the pack years and smoking habits.

50 percent to 80 percent of all bladder cancers among men are associated with the use of cigarettes.

Agree or disagree with those statements?

Would you like to look at them?

A. Sure.

Q. What I have in yellow here.

A. Uh-huh.

I'll accept that. The key words here are "influence" and "associated with."

Q. And you agree -- you agree with the statement

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that 50 percent to 80 percent of all bladder cancers among men are associated with the use of cigarettes?

A. Again, we're looking at epidemiological studies, and you'll find certain studies that will show that only 30 percent of bladder cancers are associated with smoking. Others will show 50 percent. Others may show 80 percent. It depends on the study population. It depends where that population was chosen from, what cities they lived in, what other exposures they were exposed to. No mention as to their genetic predisposition.

Q. Well, now I'm unclear as to whether you agree or disagree, or agree with qualifications with the statement -- with the clear, emphatic statement here: 50 percent to 80 percent of all bladder cancers among men are associated with the use of cigarettes.

A. I can show you other data from other researchers that will show smaller numbers.

Q. Okay. So you disagree with this?

A. I disagree with it, yes.

Q. A moment ago you said you agree?

A. No. No. I said I agreed with it as a general statement that cigarette smoking has an influence and is associated with the development of bladder cancer. I just disagree with those numbers.

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Q. I'm sure you're familiar with this book, Doctor, Cancer: Principles and Practice of Oncology, Fifth Edition, Dr. Vincent Devita, Dr. Samuel Hellman, Dr. Steven Rosenberg?

A. Yes.

Q. You're familiar with this?

A. Yes, sir.

Q. Page 245, the heading here is Cancer of the Urinary Bladder. And this statement appears, and again I'll show it to you when I'm done reading the two sentences.

Tobacco smoking is an important cause of bladder cancer.

I take it from what you've said, you disagree with that?

A. I disagree with that, yes.

Q. You would not use the word "cause"?

A. As a scientist, I can't use the word "cause" unless there's a mechanism that shows how it causes it.

Q. Do you know why -- do you know why these scientists and why the Surgeon Generals from 1964 to 1999 have no difficulty or problem using the word "cause" --

MR. MOSS: Objection, Your Honor.

MR. HEIM: Objection.

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BY MR. ROSENBLATT:

Q. -- and you do?

THE COURT: Overruled. If he can explain it.

A. I'm sorry. I don't know of a Surgeon General Report saying that cigarette smoking caused bladder cancer.

BY MR. ROSENBLATT:

Q. I don't want to get into an argument with you about Surgeon Generals. Can you explain why these authors from the -- the distinguished textbooks I'm reading from have no difficulty using the word "cause" and you do?

MR. HEIM: Objection, Your Honor.

A. Because in the general context --

THE COURT: Overruled.

A. -- of a textbook, it's allowed for them to use cause and risk interchangeably. You're asking me personally as a physician, as a scientist, to agree with that. I cannot.

BY MR. ROSENBLATT:

Q. Doctor, I'm not asking you to agree with anything. I'm simply asking you what your opinion is.

A. Well, then, I don't agree.

MR. HEIM: Objection. Arguing with the witness.

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BY MR. ROSENBLATT:

Q. Whether you agree --

THE COURT: Overruled. Not arguing. Not a problem.

BY MR. ROSENBLATT:

Q. You disagree, right?

A. I disagree with that statement, yes.

Q. Tobacco smoking is an important cause of bladder cancer. That sentence, to you, is an unscientific, inaccurate, improper statement?

A. If I were the editor of that textbook, I would have said: Yes, that is an incorrect use of the word.

Q. Have you ever edited a medical textbook?

A. I have edited manuscripts. I've not edited a textbook, no.

Q. Pathology, Third Edition, by -- the editors are Dr. Rubin and a Dr. Farber. Are you familiar with this textbook?

A. No, I'm not.

Q. On Page 312, the general -- the general topic is cancer. And tell me if you agree with this statement: Cancer of the bladder is twice as great a cause of death in cigarette smokers as in nonsmokers.

Agree or disagree with that? Cancer of the

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bladder is twice as great a cause of death in cigarette smokers as in nonsmokers?

A. Again, this is based on epidemiological studies. And what they're saying is that twice as many people who eventually die of bladder cancer have been smokers. I'll accept that.

Q. And the next sentence is: In fact, 30 to 40 percent of all bladder cancers are attributable to smoking.

A. I think that is in line with my previous statement regarding the previous textbook, where they mentioned 50 to 70 percent.

Q. It depends on the study?

A. It depends on the study.

Q. I note that this is a textbook that you're familiar with: Harrison's Principles of Internal Medicine.

A. Yes, sir.

Q. Correct?

A. Correct.

Q. Probably the premier textbook in the field of internal medicine?

A. That's correct.

Q. You would agree with that. Okay.

On Page 2517, this statement appears:

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Cigarette smoking is a cause of laryngeal, oral, pharyngeal, esophageal and bladder cancer in men and women.

Agree or disagree?

A. For the same reasons I did, I agree with that.

Q. Now, you notice -- you notice that the statement does not say: Cigarette smoking is the only cause or the exclusive cause of all these cancers, including bladder cancer. It says: It is a cause. And you don't accept that either?

A. Again, the word "cause" is used interchangeably in textbooks.

Q. Although this has been the first tobacco-related case that you've ever testified in or given a deposition in, over the years, I guess you estimate that you've given maybe, what, 20 depositions?

A. Not that many.

Q. Okay. Ten?

A. Yes. Depositions for independent medical examinations, depositions for malpractice suits, yes.

Q. Okay. And as a matter of fact, you've had some courtroom experience, where you, yourself, were sued and you were charged with malpractice?

A. That's correct.

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Q. Okay. Now, you were -- Mr. Reid asked you a question about charging lawyers, and both of you kind of made a joke about it, you know, like why shouldn't you charge lawyers. Fine. However -- however, isn't it true that when you have testified as an expert in a medical malpractice case and you were the expert for the doctor being sued, you didn't charge anything? You did that gratis?

A. Yes.

Q. Why the distinction? Lawyers and an insurance company for a doctor, them, you don't charge; but if you're testifying for the person who claims he or she is the victim of malpractice, you charge, which you have a right to do, either or both, but why the distinction?

A. First of all, I have to say it's not a -- it's not a large part of my practice, and I've only done this on three occasions in the past; and as you mentioned before, I, too, have been sued, and I have relied on my colleagues to come to my defense.

As a practicing physician, to tell what it's like to be on this side of a fence when you're faced with human beings who are subject to all sorts of influences, to whom untoward things happen, that in the courtroom, in the sparse atmosphere where you're devoid

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of the normal circumstances, only another physician would understand and be able to explain. Yes, I think in those situations, I would defend a colleague.

Q. But we're not discussing that. We're discussing, fine, you would defend a colleague if he thought --

A. Without charging him for it.

Q. Not charging him for it?

A. Yes.

Q. Sometimes you don't charge lawyers?

A. I've never -- I've never worked with a lawyer who didn't charge me.

Q. But -- but you're in a different situation, because you work with lawyers representing doctors who are being sued, that you don't charge, right, for the reasons you've expressed?

A. I'm not working for the lawyer; I'm working for the individual.

Q. Okay. Now, do you know whether or how many of your patients that you've taken care of, that are smokers and have bladder cancer, are members of this class, the class action suing all of the tobacco companies in this case?

MR. HEIM: Objection.

MR. REID: Objection, Your Honor. That's

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improper subject matter for this phase.

(The following proceedings were had at sidebar:)

THE COURT: Okay.

MR. MOSS: Your Honor, clearly, you have told us all before this case started and during this case about what was off bounds or out of bounds. You've also told us if there is any issue of a close call, come up here first. We've been through this a number of times.

Now, I think it's not a close call, but I don't think anyone in good faith could believe at least --

MR. ROSENBLATT: Again, my integrity is in question by Mr. Moss. He specialized in it.

THE COURT: Will you ignore him for a moment?

MR. ROSENBLATT: He specialized in it.

THE COURT: Ignore him.

MR. MOSS: He won't shut up.

THE COURT: I'll tell him to shut up. I'll get some tape to put across his mouth.

MR. MOSS: Judge, the individuals are not in this case. You've told us that before.

THE COURT: I know.

MR. MOSS: He's tried to introduce before

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evidence of particular class members diseases and personalize it. Your Honor told him not to do it. And here we are again. There is no relevance to that, other than to gain some passion, prejudice or sympathy, and it's wrong.

THE COURT: Okay. Why were you doing this?

MR. MOSS: You ought to do something about it.

THE COURT: Why are you doing this?

MR. ROSENBLATT: I'll tell you. I think what Mr. Moss said, in view of the previous answer, this man answers on direct, whenever -- as far as I'm concerned, he lied on direct. As far as I'm concerned, he lied, because he clearly said that he always charges lawyers when he testifies. Okay.

So, we have -- where does -- where are his sympathies in terms of credibility? He totally identifies -- he totally identifies not with the victim, but with the doctor being sued, because he's been sued.

He said on his deposition, Judge, and this is the background for this question when you got involved in this: What did you know about the Engle case?

Zero.

He knew zero.

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THE COURT: About what?

MR. ROSENBLATT: The Engle case, this case. What's this case all about?

THE COURT: Oh, the Engle case.

MR. ROSENBLATT: The Engle case. He said he knew zero.

Now, that of course, to me, is not believable, that a doctor -- you know, what kind of case is this? What's the plaintiff claiming?

Be that as it may, if Your Honor disagrees with it -- this is an area that I'm -- that I'm -- because he -- because he, as a Florida doctor -- now, I would agree, if he was from Ohio or Michigan, I've got no business asking this question. There's no question -- and obviously I'm not going to --

THE COURT: All right. Let's assume what the answer is. It may very well be that some of my patients are class members.

MR. ROSENBLATT: I'll drop it.

THE COURT: Supposing he says no, I don't know if any of my people are class members.

MR. ROSENBLATT: Didn't care -- you didn't -- then I go on to show --

MR. MOSS: Exactly.

MR. ROSENBLATT: -- that you don't even know

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what this case is all about.

THE COURT: I'll sustain the objection. I don't want to get into that.

(Discussion off the record.)

THE COURT: Put on the record what you want to say.

MR. ROSENBLATT: I came up to clarify the Judge's ruling at the sidebar, because it is now my intention to ask the witness: Do you know what the Engle case is all about? Do you think it's an individual case? Is it a class action? Do you know? Do you care?

And I don't think that at all runs afoul of your ruling.

MR. MOSS: Judge, what is the relevance of that, to the issues we're trying here?

THE COURT: Bias.

MR. MOSS: Bias, how could that go to bias?

THE COURT: I don't know.

MR. MOSS: It can't, Your Honor. You just sustained the objection that is the bias one.

THE COURT: It might very well go to bias.

MR. REID: But, Your Honor, he's a medical expert, not a legal expert, and he's going to ask him questions about what he knows what the claims are,

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whether it's a class action or not. It's beyond the scope.

MR. MOSS: We open that door --

MR. REID: Then we have to ask him --

MR. MOSS: Well, tell me where we're going.

MR. REID: How many phases are there going to be?

THE COURT: Oh, no.

MR. REID: Just opens a terrible door.

THE COURT: Every witness can be cross examined as to prejudice or bias, whether they're experts or not. That's number one.

MR. REID: Yes.

THE COURT: Number two, a general question as to knowing what the case is all about and the claim, such as medical malpractice, that they didn't do what they should have done, whatever it might have been, that's general in nature and I don't have any real problem with it.

MR. REID: Well --

THE COURT: To ask a question, such as, you know, whether this is a single action or class action, I don't see where there's any problem with that.

MR. MOSS: Okay.

THE COURT: And whether he's familiar with

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the case, either before he got into it or after he got into it, I don't have a problem with that.

To ask whether he cares, that is opening a can of worms because I don't know what you mean by that.

MR. ROSENBLATT: We won't ask him that, if he cares.

THE COURT: All right.

MR. REID: We object to going into with the witness, whether he knows the legal niceties of the case or not.

THE COURT: Yes. Overruled.

MR. MOSS: There's one other area here. If that question is allowed, then we're going to need on redirect to bring out the fact that there will be opportunities, depending upon how this Phase I comes out, for physicians to come in here in Phase II and provide individual testimony for individual.

THE COURT: Not in front of this jury at this time.

MR. MOSS: Well, then, Your Honor, you're absolutely having it as a one-sided deal.

THE COURT: I disagree with you. That's not the way it is at all. I think he's entitled to ask this question at this stage in the general terms that I

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mentioned. You're not entitled to ask another question on redirect that you just mentioned.

Okay.

MR. MOSS: Okay.

(The sidebar conference was concluded, and the following proceedings were held in open court:)

BY MR. ROSENBLATT:

Q. Dr. Cockburn, when you were contacted and agreed to review materials and testify in this case, did you know what this case was all about, other than the tobacco companies were being sued?

A. Yes. I knew in particular about Dr. Engle.

Q. You did?

A. Not -- I knew that he had suffered some medical problems and that he attributed this to cigarette smoking, et cetera, yes.

Q. Was it your impression that this was an individual case, that this case is Dr. Engle's case?

A. I know there are other defendants -- plaintiffs also, yes.

Q. You know it's a class action?

A. Yes.

Q. Involving how many people; do you know?

A. I don't know.

MR. MOSS: Objection, Your Honor.

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THE COURT: Overruled.

BY MR. ROSENBLATT:

Q. You don't know?

A. I don't know.

THE COURT: I think we've covered that area.

BY MR. ROSENBLATT:

Q. Dr. Cockburn, your deposition was taken in this case by an associate of mine by telephone, and lawyers on behalf of the tobacco companies -- some lawyers were present with you, I guess, in your office in Tampa.

The date of your deposition is December 19, 1997. Let me -- let me ask you about certain answers that you gave on Page 14.

MR. REID: Which line?

THE COURT: I think I'd better take a look at that before we go.

(The following proceedings were had at sidebar:)

MR. ROSENBLATT: That contradicts what he just said. Let me look --

THE COURT: Go down here.

MR. ROSENBLATT: Let me just look at 15.

MR. REID: Your Honor, this is far beyond the scope of anything that's relevant, whether he knew --

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MR. ROSENBLATT: No. Just this.

MR. REID: Whether he knew about the case at the date of the deposition, as opposed to today. Time has passed. I don't know when he learned what he learned.

THE COURT: Hold on, will you.

MR. REID: I'm sorry.

MR. ROSENBLATT: On the issue of bias and credibility, on depositions taken, he doesn't know the first thing about the case, and now he's saying that he acts like he knows all about Dr. Engle, and if his answer is he learned of it after his deposition, fine. Then I drop it.

MR. MOSS: Judge, we're --

MR. HEIM: That isn't impeaching.

MR. REID: That doesn't impeach anything.

THE COURT: I'm not sure if it will. Let's find out his answer.

MR. MOSS: Improper use of the deposition, then.

THE COURT: I don't think it's improper use of the deposition at all. Go ahead.

(The sidebar conference was concluded, and the following pr di: js were held in open court:)

BY MR. ROSENBLATT:

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Q. Okay. Doctor, Page 14 of your deposition, Line 9, you were asked these questions, gave these answers: Do you know what the Engle case is?

Answer: No, I don't.

Question: Do you know that the Engle case is the case that you're listed as an expert in today for purposes of this deposition?

Answer: Yes, I do now.

Question: Just as I told you just now?

Answer: No. I saw a notice that had the name on it.

Question: That is when you first found out that you were an expert in the Engle case?

Answer: No. I first found that out -- I first found out that this was the name of the plaintiff.

Question: Okay. Now that you know -- now that you know the name of this case is the Engle case, do you know anything about the case, other than its name?

Answer: No, sir.

And my question to you: Isn't it true that at the time your deposition was taken, you had no idea whether this was an individual case, a class action, or anything?

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A. At that time, that's correct.
Q. Okay. And you didn't know who Dr. Engle was --
A. No.
Q. -- at this time?
A. No.
Q. You found out after?
A. Correct.
(Discussion off the record.)
THE COURT: All right, counsel.
BY MR. ROSENBLATT:
Q. I found an article with the name which seems to be you, but it may not be you, so let me just show it to you and ask you if you're the guy.
A. Wow, you have to admit, it's an unusual name.
Q. It's not you?
A. No.
Q. But it's A.G. Cockburn, spelled exactly the same way?
A. Without the M.D., though.
Q. So it's not you?
A. I'd like to meet him.
Q. Now, part of what you've done in this case is read and review a whole bunch of articles that were given to you by the tobacco company lawyers?

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A. Among other data that I have myself, yes, and my experiences.

Q. You are familiar, are you not, with having been an expert witness in several medical malpractice cases with the concept of causation and the "but for" concept -- you know, if you're not, I'll make it specific to this.

A. Would you make it specific --

Q. Yes. Let me make it specific to this situation.

I understand you went to a chart and you talked about a variety of risk factors. And my question to you is: Have you had patients in your career, who were smokers and who had bladder cancer, where you made the determination that but for the fact that they smoked, they would not have developed bladder cancer?

For example, someone who was a three-pack-a-day smoker for 30 years ended up with bladder cancer, so have you ever made that determination on any patient of yours, that had they never smoked, had they never been a heavy smoker for so many years, in my opinion, your opinion, they would not have developed bladder cancer?

A. No.

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Q. The concept -- you were discussing it on direct examination, there's a concept known as susceptibility. Ten people may be exposed to influenza, same length of time, same exact exposure, six will get it and four won't.

Am I correct in understanding that medical science doesn't know why that is? Medical science can't really explain on a scientific basis why the six people got it and the four people didn't?

A. I can speculate on that. But, again, I'm a urologist.

Q. Okay. If you're not comfortable with it, that's fine.

A. I don't know that.

Q. Even let's take it to the field of urology. There are some people who have worked with dyes, worked with petroleum and get bladder cancer. You've named dyes and petroleum as risk factors. Then there's other people who have had the same length of exposure, maybe a longer exposure and don't get it. You don't really know why?

A. That's correct.

Q. And it's true, isn't it, if someone comes to you and says: You know, Doctor, my father had bladder cancer. And I've always been afraid of getting it

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myself. And I've been offered this terrific job in a dye factory, and I've heard that that's a risk factor for bladder cancer. Can you tell me, if I work in that factory, whether I'm going to get it? You can't answer that?

A. I'll say that it's a risk factor.

Q. It's a risk factor, okay.

Do all smokers with a particular gene defect get bladder cancer?

A. Which gene defect?

Q. Well, you tell me. I understood in your direct examination that there was a certain kind of gene defect that certain people have which makes them more susceptible to bladder cancer.

A. We suspect that there are genetic defects that lead to bladder cancer, but no one specific gene defect. Maybe in the next five years when the human genome project is completed, then we'll know the specific abnormality. First of all, when we know what the normal gene anatomy is for human beings and then we look at individuals who then have bladder cancer, we'll be able to then compare those individuals with the disease with the normal and be able to find which gene defects predispose the development of bladder cancer. But we don't think that there's one specific at all.

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Q. I want to be sure that I understood your earlier testimony when you said that you would universally recommend to smokers, who have contracted bladder cancer, to stop smoking. Would you recommend -- someone comes in, in other words, for a urinary examination. I'm sure that happens?

A. Uh-huh.

Q. And you get all done with the examination, you get all done looking at the test, the person is fine?

A. Uh-huh.

Q. But they're a heavy smoker. And you know that. And in that case, with a healthy smoker, would you recommend that they stop smoking?

A. I would tell them to cut down on the amount of smoking that they do, increase their exercise, vitamins, proper diet, among other things, yes.

Q. Now, you are board certified in urology, correct?

A. Yes, sir.

Q. You are not board certified in oncology?

A. Oncology is a medical subspecialty for which there is a specific board for that. Uro-oncology does not require a special board, just having done a fellowship in that discipline.

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Q. Now, obviously, someone can practice urology without being board certified, correct?

A. Increasingly less so.

Q. In terms of hospital privileges?

A. Privileges and things like that, yes.

Q. The hospitals much prefer board certified urologists?

A. More than the hospitals, the insurance companies, HMOs now will not send you patients unless you are board certified.

Q. So even though -- I mean, it's certainly theoretically possible that someone could be a terrific urologist and not board certified; it's obviously desirable for the reasons you've just expressed to become board certified, and that really applies to any specialty?

A. That's correct.

Q. Now, I notice in looking at your CV, Doctor, you've been at the University of South Florida in Tampa since 1985?

A. That's correct.

Q. Close to 14, 15 years?

A. That's correct.

Q. You are an assistant professor of urology?

A. Clinical assistant professor, yes.

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Q. Clinical, okay. You do not have tenure?
A. No. I don't get paid.
Q. Oh, then, I may have misunderstood. What is your actual relationship to the medical school in Tampa, as an assistant professor, clinical assistant professor?
A. Clinical assistant professor. Clinical means that you perform your usual duties, and at the same time you will have medical students or residents with you and you are teaching them essentially. This is how I do it. And they are tag-alongs. The university doesn't pay me to do this. I do this gratis.
Q. And how often do you do it?
A. Weekly.
Q. Doctor, as I look at your curriculum vitae, you've published about ten articles overall. Is this your current CV?
A. Yes, sir.
Q. And the most recent one was in 1984?
A. That's correct.
Q. So you have not published an article since then?
A. That's correct.
Q. Now, then, you were asked about your contribution to a textbook, and I see in looking at

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your CV you mention it's in press. Has it been published yet?

A. Oh, yes. Long time.

Q. Okay. It has. Okay.

You mentioned something about, as I understood it, bladder cancer in certain parts of the world, there's a hypothesis out there that a worm causes the bladder cancer?

A. The worm makes its eggs in the bladder. The irritation of the eggs on the wall of the bladder leads to the development of a specific kind of cancer called squamous cell cancer, yes.

Q. Tell me if I understood it correctly, because I made some notes as you were talking. As I've understood your concept of susceptibility, why certain people get bladder cancer, why certain people do not get bladder cancer, the gene complex injury in the uterus, something happens -- you know, genes are very much like chromosomes, correct?

A. Genes are on chromosomes. There are 46 chromosomes in each cell, and there are genes that are coded on chromosomes, like software.

Q. Very complicated?

A. Very much so.

Q. And very much not understood?

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A. We're about 75 percent identifying all the genes in the body.

Q. Identifying them, but not really knowing what causes a gene to go bad?

A. That's correct.

Q. Then you mention the two-hit theory, which I think related to susceptibility, but again, that's a theory?

A. That's true.

Q. And then during the course of your direct examination, I put quotes around something you said, where you said: In terms of finding the mechanism or understanding completely the relationship between cigarette smoking and bladder cancer, you said, we still need a lot of research, time and money to spend; we just don't know. Correct?

A. That's correct.

Q. So as I've understood your testimony and to get to somewhat of a bottom line, I take it that you, throughout your career in treating many, many patients who have had bladder cancer -- both men and women, correct?

A. Uh-huh.

Q. You have never been able to tell, because of your beliefs and because of your views, you have never

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been able to tell a single patient that the cause of your bladder cancer was cigarette smoking or anything else?

A. No. There are several patients that I can remember that I would say definitely that -- never definite in medicine. Most likely your cancer was caused by the fact that you have an in-dwelling catheter, have had it in for 15 years, and the association of that irritation of the catheter with infections predisposed you to this squamous cell cancer.

Q. But absent that kind of thing?

A. Absent that, no.

Q. And, Doctor, you've never written an article for publication on the subject of what does or what does not cause bladder cancer?

A. No, I have not.

MR. ROSENBLATT: Thank you very much.

THE WITNESS: You're welcome.

THE COURT: Redirect?

MR. REID: Just a little bit.

REDIRECT EXAMINATION

BY MR. REID:

Q. Doctor, I want to clear something up. You believe and you testified that smoking is a risk factor

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for bladder cancer?

A. That's correct.

Q. And that's because it's been epidemiologically --

MR. ROSENBLATT: Object as leading, Your Honor.

BY MR. REID:

Q. Why do you say it's a risk factor?

A. Because it has been found in epidemiologic studies to be associated with a preponderance of patients who ultimately develop cancer, among those other factors.

Q. Now, do you remember the first book that you were shown: Cancer: Epidemiology and Prevention?

A. Yes.

Q. You were read one sentence that said cigarette smoking is well established as a cause of bladder cancer.

Now, I want you to tell the jury what section of the book -- may I approach, Your Honor?

What section of the book is this section called Tobacco located in?

A. It's under risk factors.

Q. And then what does the book say after that?

A. Occupation.

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Q. And then it goes through a series of risk factors, one of which is tobacco?

A. That's correct.

Q. And in the rest of the paragraph that you weren't read, there's a reference to: An association between cigarette smoking and bladder cancer has been observed in, and it refers to case control studies and cohort studies. Now, what are case control studies?

A. Case control studies are those individuals who were found to have the disease. Cohorts are populations that are matched by age, race, sex to those case studies.

Q. I should have asked a better question. Are those epidemiological studies?

A. Yes.

Q. So this entire section is talking about epidemiological association?

A. That's correct.

Q. And you said you agreed that risk factor, there is an association?

A. Yes.

Q. And I had somebody count while we were going through it. Does the fact that they use this word in this section called Tobacco once --

MR. ROSENBLATT: Objection as leading.

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THE COURT: I don't know if it's leading yet.

BY MR. REID:

Q. If you assume in this chapter called Tobacco the word "cause" is used once and the word "risk" is used 24 times, what would that say to you?

A. Exactly what I said before. The word "risk" and "cause" are used interchangeably, but by far, we know that these factors are risk, and simply that we've not established what the cause is, so you can't use that word. That's why epidemiologists refrain from the word.

Q. In the second one you were shown, Principles of Internal Medicine, on the next page when it says -- talks about various cancers being associated with, what does that mean to you?

A. Just that, that it is a risk factor.

Q. Same thing as the other book?

A. That's correct.

Q. In the next one, when they talk about death from various cancers being attributed to smoking and important factors -- find the actual line that you were read.

THE COURT: Identify the volume.

Q. This is the volume Pathology, Third Edition. When they talk about cancer being twice as great, a

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cause, does that tell you that this is talking about epidemiology also?

A. Exactly.

Q. And by the way, you saw one book that had a 30 percent number and then you saw another book that had an 80 percent number?

A. 50 to 70 percent.

Q. Or 50 to 70, so the difference between 30 and 70, is that considered a big difference?

A. Yes.

Q. Is that your point about it depends on the study?

A. It depends on the study and the study population.

Q. So the third book, Pathology, is consistent with what you said about risk factors and association?

A. That's correct.

Q. In the one called Cancer Principles and Practice of Oncology, right after the part you were read, when it reads: The intensity of smoking are similar to those observed with respect to lung cancer, but the relative risks are smaller, what does that tell you about what this author was talking about?

A. That, again, it's a risk factor and associated only.

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Q. And you agree with that?
A. Yes.
Q. And the last one, Pathologic Basis of Disease, talking about cigarette smoking is the most important influence, increasing the risk three- to seven-fold, depending on pack years, and goes on to talk about bladder cancer are associated with the use of tobacco, what does that tell you that this author was saying?
A. Again, it's quoting epidemiological studies.
Q. Did any of those books that you were shown point to an animal model or scientific proof of mechanism?
A. No. It's still lacking.
Q. To use the word in its scientific form "cause," you'd require those?
A. Yes, sir.
MR. REID: That's all I have. Wait. I may have one other question. Yes, I do.
BY MR. REID:
Q. By the way, what is -- when they calculated the relative risk of smoking with bladder cancer, what is the relative risk?
A. About 1.3. It's very low.
Q. And that's not even considered to be

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significant, is it?

A. No.

MR. REID: Thank you.

THE COURT: All right. You may step down, Doctor. Thank you very much.

Okay. Let me confer with the attorneys.

(Discussion off the record.)

THE COURT: Okay, folks. It looks like that's all there is for the day. I'm not going to apologize anymore. But the schedule is such that we won't be able to get a witness in today.

I've just been conferring with counsel about the schedule. Tomorrow I told you you'd be off. And Friday also. 1st and 2nd, Thursday and Friday. And you come back to work on Monday at 9:15. You work Monday and Tuesday, then you'll be off the 7th, 8th and 9th, which is Wednesday, Thursday and Friday. Then you come back on the 12th.

So that's the schedule we're following. Hopefully, we can get our work done during this period of time.

So you enjoy the time off, do what you have to do. Again, be careful to follow the instructions of the Court that I've given you before regarding being exposed to any information. And stay healthy, please.

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All come back on Monday. Enjoy your time off.

All right, folks. Thank you.

(The jurors exited the courtroom.)

THE COURT: Okay. Have a seat, folks.

I did want to at least get together with you on some occasion as we're rounding the corner here toward the end. Counsel tells me that after next week, things will speed up somewhat. We're still looking hopefully to the end of April, at which time I don't know if you've got any rebuttal, but you may be considering that issue.

MR. ROSENBLATT: Right, Judge.

THE COURT: Again, we're going to have to address the issue of the various motions at the close of all the evidence and jury instructions and jury verdicts.

So I want you to be thinking about that so we can put it together. I really don't want much of a break, if we can avoid it, between the close of all the evidence and jury instructions and charge conference. So if we could do our homework on that issue, maybe we could have a session before that takes place.

MR. MOSS: I think it would really be helpful, because, as Your Honor knows, there's a lot to talk about and a lot of ground to plow. The sooner

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Your Honor invites us to do that, we'd appreciate it.

THE COURT: I'm inviting you. It's just a question of getting everybody together and a time to do it. I know you have certain ideas, what you want, and they have certain ideas, what they want. And we'll have to put all that together and have a discussion. But I really don't want to wait a long time between the close of the evidence and the actual work with the jury. So we'll think about that over this period of time.

I don't know whether or not there are any documents. They're still in abeyance. My mind tells me that there were some that the plaintiffs have that are holding off, and a bunch that you folks have that you marked for identification. I want to get that out of the way so Olga can keep her work up to date.

What else? We have to discuss this other issue about the disease categories. I think there's only two of them that you're concerned about at this point, the kidney and the cervical, I think is what you have. So we ought to have some time to discuss that one.

MR. ROSENBLATT: I would think, Judge, that after next week, when we're going to have five-day weeks, we should be able to work something out. They

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may be in a situation where they have a witness who finishes up in the early afternoon.

THE COURT: Even if we have to work a little later, I just want to get it out of the way. You know, start early for us and finish later for us. Fit it in the time frame. So think about that.

MR. HEIM: The only issue that I know of, and counsel may not be ready to talk about it today, but I keep bringing it up because it has to do with one of my witnesses testifying that remains for the Court to consider.

Your Honor will remember I reminded you that there was this issue about a particular piece of testimony that I wanted to present with Dr. Ellis. The plaintiffs, I think Susan, filed a motion, but I know what her position is. Her position was, from the plaintiffs' point of view, they don't think that testimony should be permitted, but if it is, they want to take the deposition of Dr. Ellis on that particular subject.

So I keep deferring her, you know, because I want to give them the chance to take the deposition, if they want to do it. But we need to just get this issue decided because it's a witness coming up. That's the reason I keep raising it.

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THE COURT: Generally speaking, I think the deposition should be taken, then. If you use it, fine. If you don't need it, that's all well and good. I don't mind the time, but at least you'll have it.

MR. HEIM: It will be the plaintiffs who take the deposition.

THE COURT: I understand that, but somebody is going to have to do something. It's best to do it if you've got it.

MR. HEIM: It's a very small point. It wouldn't be a long deposition.

THE COURT: It could even be by phone.

Are you finished?

MR. MOSS: I thought you were leaving.

THE COURT: We'll leave.

MR. ROSENBLATT: Thank you very much, Judge. Have a good holiday.

THE COURT: Yes. Enjoy.

(Court was adjourned at 11:35 a.m.)

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